IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 60 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUKESH DOLATRAM HARJANI
Versus
THE STATE OF GUJARAT

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Appearance :
MR KJ SHETHNA for the applicant.
MS MEETA PANCHAL, APP for the respondent.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 18/04/2006

C.A.V. JUDGMENT

1. By filing this revision application under Section 397 of the Criminal Procedure Code, the applicant, who is original accused No.2 of Sessions Case No.305/2005 has challenged the judgement and order passed by the learned Presiding Officer,

Fast Track Court No.VII, Vadodara, by which Criminal Misc. Application No.11/2006 filed by the applicant in the aforesaid sessions Case was dismissed.

2. Facts leading to the present petition are as under :

3. One Pradip Bachurao Nilhude had filed a complaint against the applicant and six other accused before the police. Said complaint was registered on 14-9-2000 in connection with offence punishable under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code and also for the offence punishable under Section 25 (1) (c) of the Arms Act. One Sunil, who was the son of Murali Ramchandra Nagdev was subjected to fatal shot. The person, who fired the shot was sitting on the pillion seat of the vehicle, namely, Yamaha motor bike. The vehicle number was disclosed as GJ-1-9227, however, the assailants fled away. It seems that initially the police has filed A-Summary report but, thereafter, in connection with some other case accused No.1 was arrested and he confessed about the crime committed with regard to the present case and, therefore, he was arrested on 25-1-2005. He was also granted remand as per the request of the investigating authority. Subsequently, since the name of the applicant was also disclosed by accused No.1 during interrogation, the applicant was arrested and produced before the Court and even remand was granted so far as present applicant is concerned. At present the applicant is an under trial prisoner in connection with the aforesaid Sessions Case.

4. After the investigation was over, accused Nos.1 to 5 were

charge sheeted and the learned Magistrate vide judgement and order dated 24-11-2005 committed the case to the Court of Sessions along with charge sheet papers. At that time, on behalf of the applicant – original accused No.2, an application was given being Criminal Misc. Application No.11/2006 under Section 227 of the Criminal Procedure Code, requesting the Court to discharge him from the said offence on the ground that there is no evidence against the applicant. It is the say of the applicant that since the applicant is arrested and charge sheet is filed only on the basis of the statement of the co-accused and since there is no independent evidence against the applicant, he is required to be discharged from the aforesaid case. Aforesaid application of the applicant was resisted by the prosecution before the trial Court on the ground that there is sufficient evidence available against the applicant – original accused No.2 and that one of the co-accused Sarvarkhan, at whose instance Panchnama is drawn regarding the place of offence, has stated that in fact, the applicant has shown the place of incident where deceased Sunil Sindhi was killed by Satish Chikna and Rakesh at the behest of the present applicant and other co-accused Arjun Chhataram. In the affidavit-in-reply filed by Police Inspector, this fact is stated in paragraph 11. Therefore, it is stated by the prosecution that it is not a case for discharge and the trial Court is required to proceed on merits against the applicant – accused No.2. Learned Presiding Officer, Fast Track Court No.VII, Vadodara vide his judgement and order dated 20-1-2006 rejected said application and found that there is a prima facie case against the applicant. It is observed that Additional Police Commissioner received a fax message and one accused Satish

alias Chikno was arrested and during his interrogation he admitted that he had committed murder of one Sunil Sindhi about four years back. In his statement, aforesaid person has admitted that he was asked to commit murder by present applicant for which a “Supari” of Rs.1,50,000/- was given and he had also managed for the fire arm. The investigating agency accordingly found that it is the case of conspiracy and murder was committed in view of business rivalry. Learned Judge also found that Court is not required to consider the merits of the evidence at the stage of discharge as, ultimately, at the time of trial all these points can be considered. Accordingly, learned Judge rejected the application of the applicant herein, which order is impugned in this revision application at the instance of the applicant – original accused No.2.

5. Mr.K.J.Shethna, learned Senior Counsel for the applicant vehemently submitted that considering the evidence on record applicant is required to be discharged as there is no legal evidence on record. He further submitted that on the basis of confessional statement of co-accused, no conviction can be recorded against the present applicant. Mr.Shethna further submitted that as per Section 25 and 26 of the Evidence Act, such statement cannot be considered and, therefore, no charge can be framed against the applicant on the basis so called confessional statement of co-accused. Mr.Shethna also submitted that except the statement of co-accused in the form of confessional statement, there is no other evidence on record and without there being any other evidence, the accused is required to be discharged as even during the trial such evidence cannot be considered and ultimately, no conviction

can be recorded against the applicant on the basis of the statement of the co-accused. Mr.Shethna submitted that on the basis of such confessional statement even accused No.1 cannot be charged for the alleged offence and, therefore, according to him, the applicant is required to be discharged as he is not required to face trial. He further submitted that in view of the settled legal position even at the conclusion of trial the applicant cannot be convicted.

6. Mr.Shethna, learned Senior Counsel appearing for the applicant has relied upon the following judgements in support of his submission that applicant is required to be discharged.

2001 (1) GLH 797
1982 Cri.Law Journal 1025
1990 (2) SCC 409
2000 (7) SCC 53
1998 (4) SCC 351
2001 (9) SCC 578
1991 (1) SCC 286
1997 (1) SCC 272
2002 (7) SCC 334
2005 (2) SCC 13
AIR 1966 SC 119
AIR 1964 SC 828
AIR 1964 SC 1184
2002 (8) SCC 447
1960 SC 1125
1972 SC 975

7. Mr.Shethna has also relied upon an unreported judgement

of the learned Single Judge of this Court delivered in Criminal Revision Application No.573 of 2004 on 29-10-2004. Mr.Shethna has also relied upon another judgement of this Court in Ibrahim @ Ibu Kalumiya Mansuri V. State of Gujarat reported in 2002 (1) GCD 758 (Guj) to substantiate his say that in case of total absence of ground or material for proceeding against accused and when there is no direct or circumstantial or documentary evidence on record, accused is entitled to be discharged and that statement of co-accused cannot be taken into consideration for holding that it is sufficient ground for proceeding against the accused.

8. On the other hand, Ms.Meeta Panchal, learned APP vehemently submitted that learned trial Judge has given appropriate reasons for rejecting the applicant's prayer for discharge. She further submitted that over and above the statement of accused No.1, investigating officer has also recorded statement of one Sarvarkhan as well as one Rakesh and they have clearly stated that the deceased was killed at the instance of the present applicant. Ms.Panchal, learned APP further submitted that over and above the statement of co-accused, there is also other piece of evidence against the present applicant. It is submitted by her that aforesaid Sarvarkhan has stated in his statement about the vehicle in question, which was used for the offence. It is submitted by her that there is also an evidence in the form of Panchnama and accordingly, there is connecting evidence. She further submitted that Sarvarkhan and other accused have stated in their statement that it was the applicant, who had shown the place of incident where the offence was committed.

Ms.Panchal, learned APP also submitted that the police had recorded statement of one Raju Parbat on 6-4-2005 and said person has stated in his statement that he had given the vehicle – Yamaha, bearing registration Number GJ-1-9227 at the request of said Sarvarkhan and it was used for the alleged offence. Ms.Panchal, learned APP submitted that since it is a case of conspiracy and when there is evidence on record which prima facie indicates that all the accused were involved in the offence, this Court should not interfere with the order passed by the trial Court, as according to her it cannot be said that the trial Court has committed any error of law, which is required to be corrected by this Court in its revisional jurisdiction.

9. Ms.Meeta Panchal, learned APP has relied upon the following judgement in support of her contentions.

AIR 1960 SC 682
2000 (5) SC 440
AIR 2000 – 1961
1999 (5) SCC 253
2004 (7) 528
AIR 2002 SC 671

10. On behalf of the prosecution affidavit-in-reply is filed by one Mr.G.S.Khaira, Police Inspector, Task Force, Vadodara City, which is at page 37 in the compilation. In paragraph 7 of the affidavit-in-reply, it is pointed that the applicant is a hard-core criminal and 19 offences are registered against him, out of which two cases are registered under Section 302 of the Indian Penal Code. Averments made in paragraphs 9 to 12 of the said

affidavit-in-reply are required to be taken into account, which are as under :

> “9. I say that in CR No. 291/2001 The present petitioner was not shown as accused in the said FIR. However, one Satish Chikna was arrested in respect of one offence in Ahmedabad City, where he has confessed that he has killed one Sunil Sindhi who was Residing at Baroda and was doing business of Furniture was killed by him in which he has also stated the name of the present petitioner, and therefore, on that basis the present petitioner was arrested on dated 4/3/2005. Thereafter, one Sarvarkhan was arrested on 7/3/2005 and thereafter Arjun Chhataram Parvani was arrested on 21/3/2005, all these accused persons have narrated the entire chain of Criminal Conspiracy to kill the deceased and the present petitioner was one the main person along with Arjun Chhataram Parvani, both of them have made a plan to kill Sunil Sindhi, with a view to take the revenge of business rivalry between Arjun Chhataram and Sunil Sindhi.
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> 10. I further say and submit that at the time of registration of offence, name of the petitioner was not disclosed by the family members of the deceased, but so far as Arjun Chhataram is concerned the name was given by the family members i.e Ramchandra Dadumal who has stated in his further statement recorded on dated 19/9/2000 that Arjun Chhataram had kill the deceased.
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> 11. I say that in short the petitioner is one of the main

culprit who has made a plan for killing of Sunil Sindhi and he has in fact gave Sopari of Rs.1,50,000 to Satish Chikna and Rakesh in the presence of co-accused Sarvarkhan for killing Sunil Sindhi. I crave leave to rely upon the statement of all co-accused at the time of hearing of the petition. It is further submitted that one of the co-accused Sarvarkhan at whose instance the panchnama is drawn for the place of offence in the said panchnanma he has stated that in fact the present petitioner has shown the place of incident where in fact deceased Sunil Sindhi was killed by Satish Chikna and Rakesh at the behest of the petitioner and other co-accused Arjun Chhataram.

12. I say that therefore there is a prima facie evidence against the petitioner under section 120(B) except the statement of co-accused, and therefore, the petitioner is not entitled to get discharge on the basis of their main contention that statement given by co-accused is in admissible under section 25 and 26 of Evidence Act but in fact when there is a charge of Section 120(B) of IPC in that case section 10 of the Evidence Act is required looked into. And as per the judgement delivered by Hon'ble Apex Court, the petitioner cannot be discharged on the ground that co-accused statement is in admissible under section 25 and 26 of Evidence Act, and therefore, petition is deserved to be dismissed."

11. Learned APP has submitted that deceased Sunil Sindhi had business rivalry with one Chhataram Parvani and the applicant originated plan of murdering said Sunil Sindhi at the instance of

Chhataram Parvani, as the applicant and said Chhataram Parvani were close friends.

12. Mr.Shethna, learned Senior Counsel appearing for the applicant submitted that from the material on record, it cannot be said that conspiracy is proved. In this connection Mr.Shethna has relied upon the decision of the Supreme Court in Saju Vs. State of Kerala, reported in (2001) 1 SCC 378. In the aforesaid case, accused were convicted by the trial Court at the conclusion of trial and the appeal of the accused was also dismissed by the High Court and thereafter, matter went to the Supreme Court. It has been held by the Supreme Court that to prove the charge of conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. To attract the applicability of Section 120-B it has to be proved that all the accused had the intention and they had agreed to commit the crime. It has to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to commission of a crime by one or more persons to the agreement, of that offence. Necessary mens rea of the crime is also required to be established. While considering Section 10 of the Evidence Act, the Supreme Court held that to attract the applicability of Section 10 of the Evidence Act, the court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other.

13. Relying upon the said decision, Mr.Shethna, learned Senior Counsel appearing for the applicant submitted that from the material on record, it cannot be said that conspiracy is proved.

14. In case of Mohd. Khalid Vs. State of West Bengal, reported in (2002) 7 SCC 334, the Supreme Court has held that proof of conspiracy can be by direct evidence, though the same is rarely available, or by circumstantial evidence. It is also held that circumstances proved before, during and after the occurrence should be considered to decide complicity of the accused. It is also held that confession of co-accused, even without corroboration, can be taken into consideration.

15. In the case of State of Maharashtra Vs. Damu Gopinath Shinde and others, reported in AIR 2000 SUPREME COURT 1691, it has been observed by the Court in paragraphs 44 and 45 as under :

> “44. One of the offences alleged against all the accused is criminal conspiracy under S. 120(B) of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with "relevancy of facts." That section renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in S.10 is that there

must be "reasonable ground to believe that two or more persons have conspired together to commit an offence." In this context, we may refer to S. Nalini v. State by D.S.P., CBI, SIT, Chennai (1999) 5 SCC 253 : (1999 AIR SCW 1889 : AIR 1999 SC 2640 : 1999 Cri LJ 3124). In paragraph 107 (of SCC) : (para 110 of AIR, Cri LJ), this Court has stated thus :-

"The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention." Under the corresponding provision in the English law the expression used is "in furtherance of the common object." No doubt, the words "in reference to their common intention" are wider than the words used in English law (vide Sardar Sardul Singh Caveeshar v. State of Maharashtra (AIR 1965 SC 682 : 1965 (1) Cri LJ 608)."

45. The basic principle which underlies in S. 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy (State of Gujarat v. Mohd. Atik (1998) 4 SCC 351 : (1998 AIR SCW 1453 : AIR 1998 SC

1686 : 1998 Cri LJ 2251). Section 10 permits "anything said, done or written by anyone of such persons in reference to their common intention" to be recorded as a relevant fact as against each of the persons believed to be so conspired."

16. In the case of State of Tamil Nadu Vs. J.Jaylalitha reported in (2000) 5 SCC 440, it has been observed by the Supreme Court in paragraph 16 as under :

"16. The question of using anything said, done or written by any one of such conspirators would arise only if the facts would help to sustain the first limb of the section i.e. there is reasonable ground to believe that two or more persons have conspired together to commit an offence. Unless the court has some materials to believe that the respondent is one of those persons referred to in the first limb of the section, so far as the conspiracy in this case is concerned, any consideration for what she had said, done or written would not be a relevant fact as against each of the conspirators. Nevertheless, it is open to the court, even at this stage to consider the materials relating to what an accused would have said, done or written with reference to the common intention between the accused for the purpose of deciding whether there is reasonable ground to believe that the said accused would have been one of the conspirators. In State v. Nalini a three-Judge Bench of this Court has stated the legal position thus regarding the first limb of Section 10 of the Evidence Act. (SCC pp.310-11, para 107)

> “107. The first condition which is almost the opening lock of that provision is exercise of 'reasonable ground to believe' that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement 'in reference to their common intention'. Under the corresponding provision in the English law the expression used is 'in furtherance of the common object'. No doubt, the words 'in reference to their common intention' are wider than the words used in English law (vide Sardar Sardul Singh Caveeshar v. State of Maharashtra).”

17. In the case of Jayendra Saraswathi Swamigal Vs. State of Tamil Nadu reported in (2005) 2 SCC 13, Supreme Court has considered the question of granting bail to the accused. In the aforesaid case, Supreme Court held that there was no evidence or material collected during investigation, which may indicate that the accused had ever shown any resentment against the deceased for having made allegations against either his personal character or the discharge of his duties as Shankaracharya of the Matt. It is also held that the facts do not show that the accused ever had the requisite cash on hand, as

claimed by the prosecution, to pay the alleged hirelings to murder the accused. It was found that there are inconsistencies/ alterations in prosecution case. Considering the material on record, the Supreme Court granted bail to the accused. It has also been held in the said case that statement of co-accused is admissible against other accused, only if prima facie evidence of existence of conspiracy is first given and accepted. In the said case, it was found that there was no prima facie case available and accordingly bail was granted.

18. In the case of Sidharth and Others Vs. State of Bihar reported in (2005) 12 SCC 545, Hon'ble Supreme Court has held as under in paragraph 19 :

> “19. It is true that the confession made by a co-accused shall not be the sole basis for a conviction. This Court in Kashmira Singh v. State of M.P. held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the

confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

19. In the case of Bharatbhai alias Jimi Premchandbhai Vs. State of Gujarat reported in (2002) 8 SCC 447, Hon'ble Supreme Court has held that a confessional statement recorded under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 is substantive piece of evidence, which is admissible and the maker of confessional statement can be convicted solely on the basis of his confessional statement.

20. So far as other judgements cited by learned advocates appearing for both the sides are concerned, they are also on the same point, i.e., whether confessional statement has any evidentiary value as per the provisions of the Evidence Act. It is no doubt true that if it is found that there is no other evidence connecting the accused with crime (except the confessional statement), the Court can pass appropriate order discharging the accused.

21. After considering the case law on the subject and considering the facts and circumstances of the case, in my view, this is not a case in which order of discharge could have been passed in favour of the applicant as it is pointed out by learned APP that other corroborating piece of evidence is also available on record. It is no doubt true that solely on the basis of confessional statement of co-accused conviction cannot be

recorded but when other piece of evidence is available on record, such confessional statement can always be considered as corroborative piece of evidence. Here is a case where the accused persons are also charged for conspiracy where the chain is complete or not is a matter, which is required to be decided at the time of trial. The question of conspiracy can be decided only after appreciating entire evidence on record at the time of trial and it cannot be said that there is no prima facie material against the applicant for proceeding with trial. Ultimately, after considering the evidence on record, the Court has to consider whether there is any sufficient evidence for proving the guilt. When there is prima facie evidence in the nature of Panchnama, recovery of muddamal, statement of vehicle owner, statement of other accused and when scene of offence is shown by the applicant etc., it cannot be said that except statement of co-accused there is no evidence worth the name which requires consideration and therefore, trial is required to proceed further on merits against the applicant. When there is prima facie material available on record and when the trial Court has rejected the application for discharge on the ground that unless the evidence is recorded at the trial it would not be just and proper to discharge the accused, in my view, said order of the trial Court is not required to be interfered with by this Court in its revisional jurisdiction.

22. In my view, considering the material on record this is not a case in which trial is required to be terminated against the present applicant at this stage on the ground that there is no evidence against the applicant worth the name except the statement of co-accused. As stated earlier and as pointed out

by learned APP, Ms.Meeta Panchal Panchnama of scene of offence is also made and statement of other accused are also recorded. Statement of owner of the vehicle is also recorded and there is a charge of conspiracy. Therefore, it cannot be said that there is no evidence except the confessional statement of the co-accused.

23. Considering the aforesaid aspect of the matter, in my view, this is not a case in which this Court would like to interfere with the order passed by the trial Court by which the application of the applicant for discharge is rejected. The material as indicated above would show that there is a prima facie case for trial against the applicant.

24. Under these circumstances, I do not find any substance in this revision application, hence, the same is rejected. Rule is discharged. Interim relief granted earlier stands vacated.

25. It is, however, clarified that the observations made by this Court in this order are made only for the purpose of deciding this revision application and these observations shall not have any bearing so far as trial is concerned. It is also clarified that this Court has not observed anything on the question whether there was any conspiracy or not and this question is required to be decided by the trial Court as per the evidence available at the time of trial. The trial Court may proceed with trial in accordance with law.

(P.B.MAJMUDAR, J.)

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